

110TH CONGRESS
2D SESSION

S. 3648

To amend the Fair Labor Standards Act to require employers to keep records of non-employees who perform labor or services for remuneration and to provide a special penalty for employers who misclassify employees as non-employees, and for other purposes.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 29 (legislative day, SEPTEMBER 17), 2008

Mr. REID (on behalf of Mr. KENNEDY) (for himself, Mr. OBAMA, and Mr. KERRY) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Fair Labor Standards Act to require employers to keep records of non-employees who perform labor or services for remuneration and to provide a special penalty for employers who misclassify employees as non-employees, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Employee
5 Misclassification Prevention Act”.

1 **SEC. 2. CLASSIFICATION OF EMPLOYEES AND NON-EM-**
2 **PLOYEES.**

3 (a) RECORDKEEPING AND NOTICE REQUIRE-
4 MENTS.—Section 11(c) of the Fair Labor Standards Act
5 of 1938 (29 U.S.C. 211(c)) is amended—

6 (1) by striking “Every employer” and inserting
7 “(1) Every employer”;

8 (2) by striking “the persons employed by him”
9 and inserting “(A) the persons employed by such
10 employer”;

11 (3) by striking “maintained by him” and insert-
12 ing “, (B) the individuals who are not employees of
13 the employer (within the meaning of section 3(g))
14 but with whom the employer, in the course of the
15 trade or business in which the employer is engaged,
16 has engaged for the performance of labor or services,
17 and of the remuneration relating to the performance
18 of labor or services by such individuals, and (C) the
19 notices required under paragraph (3),”; and

20 (4) by inserting at the end the following:

21 “(2) All records under this subsection shall contain
22 an accurate classification of the status of each individual
23 described in paragraph (1) as either an employee of the
24 employer (within the meaning of section 3(g)) or a non-
25 employee engaged by the employer for the performance of
26 labor or services.

1 “(3)(A) Every employer subject to any provision of
2 this Act or any order issued under this Act shall provide
3 the notice described in subparagraph (C) to each employee
4 of the employer and each individual classified under para-
5 graph (2) as a non-employee engaged by the employer for
6 the performance of labor or services.

7 “(B) Such notice shall be provided, at minimum, not
8 later than 6 months after the date of enactment of the
9 Employee Misclassification Prevention Act, and thereafter
10 for new employees, upon employment, and for non-employ-
11 ees engaged for the performance of labor or services, upon
12 commencement of the services subject to such contract.
13 Every employer shall also provide such notice to any indi-
14 vidual upon changing such individual’s status as an em-
15 ployee or non-employee under paragraph (2).

16 “(C) The notice required under this paragraph shall
17 be in writing and shall—

18 “(i) inform the individual of the employer’s
19 classification of the individual as an employee or a
20 non-employee under paragraph (2);

21 “(ii) include a statement directing such indi-
22 vidual to a Department of Labor website established
23 for the purpose of providing further information
24 about the rights of employees under the law;

1 “(iii) include the address and telephone number
2 for the applicable local office of the Federal Depart-
3 ment of Labor;

4 “(iv) include for those individuals classified by
5 the employer as a non-employee under paragraph
6 (2), the following statement: ‘Your rights to wage,
7 hour, and other labor protections depend upon your
8 proper classification as an employee or non-em-
9 ployee. If you have any questions or concerns about
10 how you have been classified or suspect that you
11 may have been misclassified, contact the U.S. De-
12 partment of Labor.’; and

13 “(v) include such additional information as the
14 Secretary shall prescribe by regulation.”.

15 (b) SPECIAL PROHIBITED ACT.—Section 15(a) of
16 such Act is amended by adding at the end the following:

17 “(6) to fail to accurately classify an individual
18 in accordance with section 11(c).”.

19 (c) SPECIAL PENALTY FOR CERTAIN RECORD-
20 KEEPING AND NOTICE VIOLATIONS.—Section 16 of the
21 Fair Labor Standards Act of 1938 (29 U.S.C. 216) is
22 amended—

23 (1) in subsection (b)—

1 (A) in the third sentence, by striking “ei-
 2 ther of the preceding sentences” and inserting
 3 “any of the preceding sentences”; and

4 (B) by inserting after the first sentence
 5 the following: “Such liquidated damages are
 6 doubled (subject to section 11 of the Portal-to-
 7 Portal Pay Act of 1947 (29 U.S.C. 260))
 8 where, in addition to violating the provisions of
 9 section 6 or 7, the employer has violated the
 10 provisions of section 15(a)(6) with respect to
 11 such employee or employees.”; and

12 (2) in subsection (e), after the first sentence in
 13 the matter preceding paragraph (1), by inserting the
 14 following: “Any person who repeatedly or willfully
 15 violates section 15(a)(6) shall be subject to a civil
 16 penalty of not to exceed \$10,000 for each such viola-
 17 tion.”.

18 (d) EMPLOYEE RIGHTS WEBSITE.—Not later than
 19 90 days after the date of enactment of this Act, the Sec-
 20 retary of Labor shall establish, for purposes of section
 21 11(c)(3)(C)(ii) of the Fair Labor Standards Act of 1938
 22 (as added by this Act), a single web page on the Depart-
 23 ment of Labor website that summarizes in plain language
 24 the rights of employees under the Fair Labor Standards
 25 Act and other Federal laws. Such web page shall contain

1 appropriate links to additional information on the Depart-
 2 ment of Labor website or other Federal agency websites,
 3 including wage and hour complaint forms, along with a
 4 statement explaining that employees may have additional
 5 or greater rights under State or local laws and how em-
 6 ployees may obtain additional information about their
 7 rights under State or local laws. Such web page shall be
 8 made available in English and any other languages which
 9 the Secretary determines to be prevalent among individ-
 10 uals likely to access the web page. The Secretary shall co-
 11 ordinate with other relevant Federal agencies in order to
 12 provide similar information (or a link to the Department
 13 of Labor web page required by this subsection) on the
 14 websites of such other agencies.

15 **SEC. 3. MISCLASSIFICATION OF EMPLOYEES FOR UNEM-**
 16 **EMPLOYMENT COMPENSATION PURPOSES.**

17 (a) IN GENERAL.—Section 303(a) of the Social Secu-
 18 rity Act (42 U.S.C. 503(a)) is amended—

19 (1) in paragraph (10), by striking the period
 20 and inserting “; and”; and

21 (2) by adding after paragraph (10) the fol-
 22 lowing:

23 “(11)(A) Such auditing and investigative pro-
 24 grams as may be necessary to identify employers
 25 that have not registered under the State law or that

1 are paying unreported compensation, where these ac-
2 tions or omissions by the employers have the effect
3 of excluding employees from unemployment com-
4 pensation coverage; and

5 “(B) The making of quarterly reports to the
6 Secretary of Labor (in such form as the Secretary
7 of Labor may require) describing the results of pro-
8 grams under subparagraph (A); and

9 “(12) The establishment of administrative pen-
10 alties for misclassifying employees, or paying unre-
11 ported compensation to employees without proper
12 recordkeeping, for unemployment compensation pur-
13 poses.”.

14 (b) REVIEW OF AUDITING PROGRAMS.—The Sec-
15 retary of Labor shall include, in the Department of La-
16 bor’s system for measuring States’ performance in con-
17 ducting unemployment compensation tax audits, a specific
18 measure of their effectiveness in identifying the under-
19 reporting of wages and the underpayment of unemploy-
20 ment compensation tax contributions (including their ef-
21 fectiveness in identifying instances of such underreporting
22 or underpayments despite the absence of cancelled checks,
23 original time sheets, or other similar documentation).

24 (c) EFFECTIVE DATE.—

1 (1) IN GENERAL.—Except as provided in para-
2 graph (2), the amendments made by subsection (a)
3 shall take effect 12 months after the date of the en-
4 actment of this Act.

5 (2) EXCEPTION.—If the Secretary of Labor
6 finds that legislation is necessary in order for the
7 unemployment compensation law of a State to com-
8 ply with the amendments made by subsection (a),
9 such amendments shall not apply with respect to
10 such law until the later of—

11 (A) the day after the close of the first ses-
12 sion of the legislature of such State which be-
13 gins after the date of the enactment of this Act;
14 or

15 (B) 12 months after the date of the enact-
16 ment of this Act.

17 (d) DEFINITIONS.—For purposes of this section—

18 (1) the term “State” has the meaning given
19 such term by section 3306(j) of the Internal Rev-
20 enue Code of 1986 (26 U.S.C. 3306(j)); and

21 (2) the term “session”, as used with respect to
22 a State legislature, means a regular, special, budget,
23 or other session of such legislature.

1 **SEC. 4. DEPARTMENT OF LABOR COORDINATION AND RE-**
2 **FERRAL.**

3 Notwithstanding any other provision of law, any of-
4 fice, administration, or division of the Department of
5 Labor that, while in the performance of its official duties,
6 obtains information regarding the misclassification by an
7 employer of any individual regarding whether such indi-
8 vidual is an employee or a non-employee contracted for
9 the performance of services for purposes of section 6 or
10 7 of the Fair Labor Standards Act or in records required
11 under section 11(c) of such Act, shall report such informa-
12 tion to the Employment Standards Administration of the
13 Department. The Employment Standards Administration
14 may report such information to the Internal Revenue
15 Service as the Administration considers appropriate.

16 **SEC. 5. TARGETED AUDITS.**

17 The Secretary of Labor shall ensure that at least 25
18 percent of the audits of employers subject to the Fair
19 Labor Standards Act that are conducted by the Wage and
20 Hour Division of the Department of Labor are focused
21 on potential violations of the recordkeeping requirements
22 of section 11(c) of such Act (29 U.S.C. 211(c)) (as amend-
23 ed by this Act). Such Division shall focus such audits on
24 employers in industries with frequent incidence of mis-

- 1 classifying employees as non-employees, as determined by
- 2 the Secretary.

